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No. ~~555~~ 30

In the Supreme Court of the United States

OCTOBER TERM, 1954

DANTAN GEORGE REA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals (R. 2–7, Pet. 15–20) [1] has not yet been reported. The opinion of the District Court is unreported (Tr. 7–8).

JURISDICTION

The judgment of the Court of Appeals was rendered on December 23, 1954 (R. 8). The petition for a writ of certiorari was filed on January

[1] The designation "R." refers to the record of proceedings in the Court of Appeals; the designation "Tr." refers to the printed Transcript of Record in the District Court.

19, 1953. The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether a federal court should enjoin a federal officer from testifying in a state criminal proceeding regarding evidence which he had seized under an invalid federal search warrant and which had been suppressed in the federal court as unlawfully seized.

2. Whether a federal court should enjoin federal officers from transferring possession of such suppressed evidence to state prosecuting officials.

RULES INVOLVED

The Federal Rules of Criminal Procedure provide, in pertinent part:

> Rule 1. Scope.
>
> These rules govern the procedure in the courts of the United States and before United States commissioners in all criminal proceedings, with the exceptions stated in Rule 54.

> Rule 41. Search and Seizure.
>
> * * * * *
>
> (e) *Motion for Return of Property and to Suppress Evidence.*
>
> A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient

on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

STATEMENT

On September 12, 1953, an indictment charging the unlawful acquisition of marihuana in violation of 26 U. S. C. 2593 (a) was returned against petitioner in the United States District Court for New Mexico (Tr. 2). Petitioner subsequently moved to suppress as evidence marihuana and other property taken from his home by federal narcotics agent Salter, on the ground that the warrant on which the search was based was invalid [2] (Tr. 3–4). The motion sought to have the property "suppressed as evidence against him in

[2] Petitioner's motion alleged that (a) the warrant was insufficient on its face, (b) no probable cause existed, and (c) the affidavit was based on unsworn statements (Tr. 3–4).

any criminal proceeding"; including the proceeding in which the motion was filed (Tr. 3–4). On June 18, 1954, the District Court granted the motion to suppress, and, on the Government's motion, dismissed the indictment (Tr. 4–5).

Immediately thereafter, on the basis of a complaint filed by federal narcotics agent Salter, a warrant of arrest was issued against petitioner by a New Mexico court charging him with possession of marihuana in violation of state law (Tr. 6–7). Petitioner was thereupon arrested and held for trial in the state court on this charge.

Alleging that the evidence which had been suppressed in the federal court formed the basis of the state charge, petitioner, on June 21, 1954, sought in the United States District Court an order holding Salter in contempt for violation of the order of suppression and enjoining him and other agents of the United States from transferring the seized evidence to state authorities or testifying with respect thereto in the state courts (Tr. 5–7). The District Court denied the motion, holding that (Tr. 8):

> * * * suppression of evidence in a Federal Court, under Rule 41 of the Federal Rules of Criminal Procedure, and the Fourth Amendment to the Constitution of the United States, applies only to proceedings in a United States District Court,

[3] The motion did not seek the return of the marihuana. Since it was contraband, it was not returned.

and does not govern the use of that evidence in a State Court.

On appeal, the Court of Appeals affirmed the order (R. 8).

ARGUMENT

While the problem here presented is substantial and has not heretofore been directly determined by this Court, further review in this case is unnecessary because (1) the decision below is correct in the light of this Court's prior decisions; and (2) in any event petitioner will have ample opportunity in the state proceedings to test his federal question, but without the necessity of creating a needless clash between coordinate state and federal courts.

1. The holdings of this Court clearly limit the application of the rule relating to the suppression and exclusion of improperly seized evidence to the federal courts and also strictly enjoin lower federal courts from interfering with the conduct of state judicial proceedings. As the court below recognized (R. 7; Pet. 19), the net effect sought by petitioner's application is to have the federal courts control and limit the evidence which may be available to a state court for prosecution of a state crime. This Court has consistently refused to do so. As was recently stated in *Stefanelli* v. *Minard*, 342 U. S. 117, 120:

> We hold that the federal courts should refuse to intervene in State criminal proceedings to suppress the use of evidence

> even when claimed to have been secured by unlawful search and seizure. The maxim that equity will not enjoin a criminal prosecution summarizes centuries of weighty experience in Anglo-American law. It is impressively reinforced when not merely the relations between coordinate courts but between coordinate political authorities are in issue.

While the *Stefanelli* case involved a proceeding against state officials to prevent the use of evidence alleged to have been wrongfully seized by state officers, the circumstance that this case involves an attempt to control the use by the state of the testimony of a federal officer in no way lessens the controlling force of that decision. Petitioner, like Stefanelli, is attempting to have a federal court tell a coordinate state court what evidence it may or may not use.

This Court held in *Wolf* v. *Colorado*, 338 U. S. 25, 33, that "in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure"—a holding which was recently reaffirmed in *Irvine* v. *California*, 347 U. S. 128, 132–133. If a state may use evidence wrongfully seized by its own officers over whom it has control, there is no reason for it to be barred from using evidence seized by officers over whom it has no control. Cf. the dictum in *Byars* v. *United States*, 273 U. S. 28, 33, to the effect that the rule of suppression in

federal courts does not apply to evidence wrongfully seized by state officers without federal participation.

Petitioner admits that if the premise is granted that the rule of suppression is "only a rule of evidence applicable to Federal criminal trials, imposed as a matter of Federal judicial policy," the conclusion reached by the court below might follow (Pet. 9–10). As Justice Black said in his concurring opinion in the *Wolf* case, 338 U. S. at p. 39–40, the "plain implication of the Court's opinion" in that case is just that premise, that "the federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate". Petitioner seems to think (Pet. 11) that the interpretation of the exclusionary rule as a rule of evidence is negated by such cases as *Go-Bart Co.* v. *United States*, 282 U. S. 344, holding that property wrongfully seized, which is not contraband, should be returned. However, an order for return is not necessarily an order for suppression, except to the extent that the Fifth Amendment might bar compulsory production of such property at the trial. Certainly an order to return would not in and of itself bar the use of oral testimony as to what was observed.[4]

[4] For the same reason there is no force in petitioner's argument that, if the property seized had not been contraband, it would not have been available to the state. Oral testimony would still have been available to the state.

The use of improperly obtained evidence is barred in the federal courts under the rule of suppression which is presently found in Rule 41 of the Federal Rules of Criminal Procedure. This rule was developed by this Court in cases like *Weeks* v. *United States*, 232 U. S. 383; *Byars* v. *United States*, 273 U. S. 28; *Gambino* v. *United States*, 275 U. S. 310; and *Lustig* v. *United States*, 338 U. S. 74; cf. *McNabb* v. *United States*, 318 U. S. 332. The Court has recently explained this federal rule as having been adopted because convictions based on the use of unlawfully acquired evidence tend to "encourage the kind of society that is obnoxious to free men." *Walder* v. *United States*, 347 U. S. 62, 65. However, this rule is not one which the Constitution requires individual states to adopt. *Wolf* v. *Colorado*, 338 U. S. 25. A majority of the states have rejected it as a rule of state practice. See *Wolf* v. *Colorado*, *supra*, at 33–39. The frequent rejection of this rule in individual states has been based primarily on its effect in excluding trustworthy, reliable, relevant and probative evidence from criminal prosecutions. The extension here sought of the federal exclusionary rule would require lower federal courts to interfere with and control state courts in determining ahead of trial what evidence the state court is free to hear in the course of state criminal prosecutions.

Furthermore, in this case suppression occurred for reasons which do not establish any

clear-cut violation of the right of privacy, thus further pointing up the undesirability of having a federal court dictate to a state court the evidence which it should be allowed to use. A federal search warrant was in fact applied for and issued to the federal narcotics agent. He discovered the unlawful marihuana while operating under this warrant (Tr. 3). As far as appears from the record on appeal, the challenge to its validity may have been based only on the inclusion of hearsay statements in the affidavit to establish probable cause (Tr. 3–4). While the district judge sustained petitioner's challenge, his order was wholly unappealable by the Government. A state judge might properly reach a contrary result.

2. If petitioner should be convicted in the state prosecution, the same federal question which he here asserts could be tested through an appeal to state appellate courts, and, if necessary, by a certiorari petition to this Court. This would be a far more appropriate and orderly method of review, should petitioner be hereafter convicted in a state prosecution based upon the use of this federally suppressed evidence. Thus a needless clash between coordinate courts, state and federal, would be avoided, without in any way denying the petitioner a full opportunity to get appropriate rulings on the federal question which he here raises prematurely.

CONCLUSION

We must, of course, acknowledge that the case presents a substantial issue, in a field in which this Court has recently shown much interest and where various conflicting views have been expressed. If the Court believes that it would be useful to determine whether a federal court should affirmatively restrain a federal officer from testifying or supplying evidence in a state criminal proceeding, where the federal officer is the sole complaining witness and his testimony and evidence were acquired during a federal search that has been declared improper, this case might offer an appropriate opportunity.

However, further review would seem unnecessary, since the decision below appears to be correct in the light of this Court's prior decisions (a) holding the federal exclusionary rule inapplicable to state courts and (b) enjoining lower federal courts from interfering with the conduct of state judicial proceedings. Therefore, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY 1955.

U. S. GOVERNMENT PRINTING OFFICE 1955